NO. 34814-8-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN JACKSON,

Respondent / Cross-Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR ASOTIN COUNTY

The Honorable Ray Lutes, Judge
The Honorable Scott Gallina, Judge

BRIEF OF RESPONDENT / CROSS-APPELLANT

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A. COUNTER ASSIGNMENT OF ERROR

1. Appellant did not make a knowing, intelligent, and voluntary waiver of his right to counsel at his initial bond hearing, which resulted in the bond order later used to prove an essential element of appellant's bail jumping conviction.

Issue Pertaining to Counter Assignment of Error

Appellant was not represented by counsel at the trial court's initial bond hearing and did not validly waive his right to counsel at that hearing. Must this Court vacate the bond order that resulted from that hearing, which then necessitates dismissal of appellant's bail jumping conviction because release by a court order or admission to bail is an essential element of the offense?

B. COUNTER STATEMENT OF THE ISSUES

1. Should this Court decline to review the State's argument regarding the exceptional sentence downward where the State failed to comply with the Rules of Appellate Procedure by not including any assignments of error in its opening brief?

2. In sentencing appellant for bail jumping, did the trial court act well within the bounds of the law and its discretion where it imposed an exceptional sentence downward of 30 months based on the mitigating circumstances that appellant's forgetfulness and lackadaisical attitude

resulted in him mistakenly missing a single pretrial hearing, and then further found none of the purposes of the Sentencing Reform Act (SRA) of 1981, chapter 9.94A RCW, would be served by a standard range sentence?

C. COUNTER STATEMENT OF THE CASE

1. Procedural History

On November 30, 2015, the State charged Stephen Jackson with possession of a controlled substance (methamphetamine), third degree assault, and third degree possession of stolen property. CP 11-13. The trial court held a probable cause and bond hearing that same day, at which Jackson was not represented by counsel. RP 4-5, 9. The court released Jackson on bond pending trial and entered a bond order, specifying conditions of release, including making all court appearances. CP 15-16.

Jackson was arraigned on December 7, 2015, again without counsel present. RP 16-19. Counsel was finally appointed on December 21, 2015. CP 111; RP 29-31. From there, Jackson appeared at hearings for the next several months as the case limped along: continuance (January 4, 2016), trial setting (January 11, 2016), pretrial (February 1, 2016), review status (February 16, 2016), resetting (February 22, 2016), and resetting (February 29, 2016). RP 36, 41, 47, 52, 57, 62.

On May 2, 2016, Jackson appeared late for a pretrial hearing, at which defense counsel moved to strike the trial date. RP 69-70. Another

resetting hearing was held on May 16, to which Jackson was late. RP 74-75. At that hearing, the parties agreed on July 26 for the trial date. RP 75. The State noted the pretrial hearing would be held on July 11, and Jackson signed a promise to appear at 9:00 a.m. on that date. CP 17.

On July 11, Jackson failed to appear for the pretrial hearing. RP 79. Defense counsel noted it had been a long time since Jackson's last court date and counsel had not had a chance to call Jackson. RP 79-80. The trial court granted the State's request for a bench warrant. RP 79-80.

At a bond hearing on July 15, Jackson explained he thought was he was set for trial on July 26 and he did not realize there was another pretrial hearing set for July 11. RP 86-87. He explained, "[m]y attorney hasn't been in contact with me." RP 87. Jackson's attorney confirmed he usually calls Jackson in advance of court hearings, but "I wasn't able to do that [on July 11] because . . . I did not have a phone." RP 91. The court acknowledged the promise to appear was issued back in May, which is "[k]ind of a long time to keep things on the front burner for Mr. Jackson." RP 92. The court further noted Jackson made all "his appearances here since December." RP 92. The court accordingly reinstated Jackson's bond. RP 92; CP 23-24.

On July 20, the State filed a motion to amend the information to add the charge of bail jumping. CP 25. A second amended information was filed on September 12, charging Jackson with bail jumping and alleging he

failed to appear on July 11, despite having previously been released by a court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance in court. CP 34; CP 47 (third amended information); RP 153-54. The State ultimately dropped the underlying assault and possession charges based on evidentiary issues,[1] leaving only the bail jumping charge. RP 115, 127; CP 33. The parties proceeded to a jury trial on the bail jumping charge in October 2016.

2. Trial: State's Case

McKenzie Kelley, chief deputy clerk of the Asotin County Superior Court in May-July 2015, was the State's sole witness at trial. RP 158. Kelley testified she was familiar with Jackson and his court file. RP 159-60. She testified class C felony charges were filed against Jackson on November 30, 2015. RP 161; Ex. P-1. Kelley further testified a bond order was entered on November 30, requiring Jackson to make all court appearances. RP 162-63; Ex. P-2. Jackson posted 10 percent of the bond amount and was released from jail pursuant to the bond order. RP 164-65.

Kelley explained Jackson's case was called for a resetting hearing on May 16, 2016. RP 166. Kelley's minutes reflected Jackson was in court that day and the bond order was still in effect. RP 166-68. July 11 was selected

[1] The State explained in its opening brief that the officer who Jackson purportedly assaulted was terminated from the police force and has criminal charges pending against him. Br. of Appellant, 4.

for the pretrial hearing and July 26 for trial. RP 166. She testified Jackson signed a promise to appear on July 11. RP 167-68; Ex. P-3. Kelley testified Jackson did not appear on July 11 for the pretrial hearing, so a "bench warrant was issued with a no bond hold." RP 168.

3. Trial: Defense Case

Jackson explained that on May 16, he just "heard a bunch of dates," and only the date of trial, July 26, stood out to him. RP 192. He did not remember the July 11 date and did not realize there would be another pretrial hearing. RP 192-93. He admitted he "probably didn't read" the promise to appear. RP 201. Jackson recalled the May 16 hearing lasted "[m]aybe about two minutes, three at the most, if that -- if that," consistent with Kelley's agreement that resetting hearings occur very quickly and there are usually around 50 cases on the docket for a resetting day. RP 170-74, 194.

Jackson acknowledged he missed court on July 11. RP 194-95. Jackson discovered this on July 14 when he reported to his probation officer, who he must report to at least three times a month. RP 195-97. When an officer arrived at his probation office, Jackson explained, "I didn't know what was going on." RP 197. He was "very surprised" and "baffled" because "I just knew that I had to go to court on the 26th for trial." RP 198-99. He was not aware he was supposed to be in court on July 11. RP 198.

The jury was instructed that in order to convict Jackson, it needed to find the following elements beyond a reasonable doubt:

> (1) That on or about 11th day of July, 2016, the Defendant failed to appear before a court;
>
> (2) That the Defendant was being held for or was charged with (Possession of a Controlled Substance (Methamphetamine) and/or Assault in the Third Degree;
>
> (3) That the Defendant had been released by a court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before the court; and
>
> (4) That the acts occurred in Asotin County, the State of Washington.

CP 53. Jackson did not dispute the first, second, or fourth elements—only the third element of knowledge. RP 248. In closing argument, defense counsel emphasized Jackson appeared for his court dates for over half a year before missing one pretrial hearing. RP 247. The issue was therefore whether he knew he was supposed to appear on July 11. RP 245-49.

The jury found Jackson guilty as charged. RP 260-61; CP 57.

4. Exceptional Sentence Downward

The case proceeded to sentencing on October 7, 2016. RP 266-68. Based on Jackson's criminal history, which largely consists of drug and alcohol-related offenses, the State calculated his offender score to be 11. CP

171-72; RP 268-70. The State asked the trial court to impose the high end of the standard range: 60 months. RP 270-71.

Defense counsel noted "Mr. Jackson advised that he would like the Court to entertain the prospect of a downward departure below the low end, which is 51 months." RP 274. In allocution, Jackson explained he had "been on probation for a whole year without any violations and without not even a warning" when he was charged with bail jumping. RP 278-79.

At the end of Jackson's allocution, the court explained, "I've been struggling with this case. It kept me up last night." RP 280. The court acknowledged the conviction and offender score resulted in a presumptive range of 51 to 60 months. RP 280. However, the court explained, "based on the nature of the offense in this case, I just cannot get there." RP 280. The court noted it had discretion to consider mitigating circumstances outside the illustrative though not exhaustive list in RCW 9.94A.535. RP 280-81.

The court emphasized that as it listened to the State and defense case, the overwhelming sense "was that Mr. Jackson was lackadaisical." RP 281. The court explained:

> This is not a gentleman who skipped town, went on a crime spree across six states, and finally got corralled somewhere in the Badlands of South Dakota. This is an individual who missed a court date and, by all accounts, has a very difficult time keeping times and dates straight for court . . . .

RP 283. The court also noted Jackson was arrested on the bench warrant "while he was observing the terms of [his] supervision." RP 283. The court believed this showed Jackson's actions were not malicious or based on "some kind of wrongful mindset." RP 283. The court could not find justification in the SRA to justify "punish[ing] so harshly someone who is lackadaisical." RP 281.

The court acknowledged Jackson's criminal history, but explained "[t]his is not the type of crime that I feel poses a huge community safety concern." RP 283-85. Nor would a 60-month sentence give Jackson an opportunity to improve himself "other than to give him a very, very long time to think about the fact that he missed a court date." RP 285. The court believed "the State's resources are better off housing violent and dangerous people rather than an individual like Mr. Jackson, who is, by everyone's characterization, lackadaisical." RP 285.

The trial court accordingly sentenced Jackson to an exceptional sentence downward of 30 months. RP 286; CP 62. The State objected. RP 286-88. The trial court responded: "I am finding by a preponderance of the evidence that it has been shown that . . . Mr. Jackson's lack of appearance was a mistake. He had knowledge, ah, but it was a mistake and was characterized as such by both parties during the course of trial." RP 289.

The court entered written findings of fact and conclusions of law reflecting its oral ruling. CP 106-10.

Both Jackson and the State appealed. CP 67, 77.

D. ARGUMENT OF CROSS-APPELLANT

JACKSON DID NOT MAKE A KNOWING AND INTELLIGENT WAIVER OF HIS RIGHT TO COUNSEL AT HIS INITIAL BOND HEARING, WHICH RESULTED IN THE BOND ORDER LATER USED TO PROVE BAIL JUMPING.

The trial court held an initial probable cause and bond hearing on November 30, 2015. Jackson was not represented by an attorney, though he had a right to one at that hearing. Jackson did not validly waive his right to counsel, stating only, "I don't really need an attorney right now." RP 9. The court entered a bond order at that hearing, which was later used to prove an essential element of Jackson's bail jumping conviction. Because that bond order was entered without the benefit of counsel, it must be vacated and Jackson's bail jumping conviction dismissed for insufficient evidence.

1. Jackson had a right to counsel at the bond hearing.

"An accused's right to be represented by counsel is a fundamental component of our criminal justice system." United States v. Cronic, 466 U.S. 648, 653, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Under both the federal and state constitutions, the accused is entitled to the assistance of counsel at all critical stages of criminal proceedings. U.S. CONST. amend.

VI; CONST. art. I, § 22; Missouri v. Frye, 566 U.S. 133, 140, 132 S. Ct. 1399, 1405, 182 L. Ed. 2d 379 (2012); State v. Heddrick, 166 Wn.2d 898, 909-10, 215 P.3d 201 (2009).

A critical stage is one "'in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected.'" Heddrick, 166 Wn.2d at 910 (quoting State v. Agtuca, 12 Wn. App. 402, 404, 529 P.2d 1159 (1974)). The bond hearing in Jackson's case was a critical stage because it resulted in entry of the bond order that was later used to prove bail jumping. Jackson therefore had a constitutional right to counsel at that proceeding.

Even if this Court determines Jackson did not have a constitutional right to counsel at the bond hearing, he had a statutory and rule-based right to counsel. The Washington criminal rules confer an early right to counsel. CrR 3.1(b)(1) provides "[t]he right to a lawyer shall accrue as soon as feasible after the defendant is taken into custody, appears before a committing magistrate, or is formally charged, whichever occurs earliest." The rule further specifies "[a] lawyer shall be provided at every stage of the proceedings." CrR 3.1(b)(2).

The Washington Constitution further provides "[a]ll persons charged with crime shall be bailable by sufficient sureties," with few exceptions. CONST. art. 1, § 20. Chapter 10.21 RCW details the procedures trial courts

must follow in making bail determinations under article I, section 20. RCW 10.21.010; Laws of 2010, ch. 254, § 1. A judicial officer must hold a bail hearing "immediately upon the defendant's first appearance," unless good cause is shown. RCW 10.21.060(2). The officer must "determine whether any condition or combination of conditions will reasonably assure the safety of any other person and the community." RCW 10.21.060(1).

At the bail hearing, the accused "has the right to be represented by counsel, and, if financially unable to obtain representation, to have counsel appointed." RCW 10.21.060(3). In addition, the accused "must be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise." Id.

Thus, RCW 10.21.060(3) and CrR 3.1(b) both provide the right to counsel at bond hearings. The trial court correctly noted at the November 30, 2015 bond hearing that Jackson had "a right to an attorney today to help you establish conditions of release." RP 9. The question then becomes whether Jackson validly waived that right to counsel.

2. Jackson did not make a knowing, intelligent, and voluntary waiver of his right to counsel.

A valid and effective waiver of the constitutional right to counsel must unequivocally demonstrate that the accused knowingly, intelligently,

and voluntarily waived the assistance of counsel. Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Silva, 108 Wn. App. 536, 539, 31 P.3d 729 (2001). The validity of a waiver is measured by the accused's understanding at the time he waives his right to counsel. United States v. Mohawk, 20 F.3d 1480, 1484 (9th Cir. 1994).

Washington courts have yet to decide whether the statutory right to counsel at a bail hearing requires a knowing and voluntary waiver. Child dependency and sexually violent predator proceedings therefore provide a useful analogy.

Parents have a statutory right to counsel in dependency and termination proceedings. RCW 13.34.090(2); In re Welfare of G.E., 116 Wn. App. 326, 331-32, 65 P.3d 1219 (2003). Based on this statutory right, Washington courts hold that waiver of the right to counsel in dependency and termination proceedings "must be expressed on the record and knowingly and voluntarily made." G.E., 116 Wn. App. at 333.

Individuals subject to sexually violent predator commitment proceedings likewise have a statutory right to counsel. RCW 71.09.050(1); State v. Ransleben, 135 Wn. App. 535, 540, 144 P.3d 397 (2006). As in dependency proceedings, the individual must make a knowing, intelligent, and unequivocal waiver of that right. In re Det. of Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1999).

These analogous cases make clear that when an individual is conferred a statutory right to counsel, then waiver of that right must meet the constitutional waiver standard: unequivocal, knowing, intelligent, and voluntary. Jackson's waiver of counsel at the November 30 bond hearing did not meet that standard.

There is no specific formula for determining a waiver's validity. Silva, 108 Wn. App. at 539. However, "the preferred method is a court's colloquy with the accused on the record detailing at a minimum the seriousness of the charge, the possible maximum penalty involved, and the existence of technical, procedural rules governing the presentation of the accused's defense." Id. In other words, the accused "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" Faretta, 422 U.S. at 835 (quoting Adams v. United States, 317 U.S. 269, 279, 63 S. Ct. 236, 87 L. Ed. 268 (1942)).

Absent a colloquy, the record must reflect the accused was "fully apprised of these factors and other risks associated with self-representation." Silva, 108 Wn. App. at 540; accord State v. DeWeese, 117 Wn.2d 369, 378, 816 P.2d 1 (1991). "[O]nly rarely will adequate information exist on the record, in the absence of a colloquy, to show the required awareness of the

risks of self-representation." City of Bellevue v. Acrey, 103 Wn.2d 203, 211, 691 P.2d 957 (1984).

"[T]he right to counsel does not depend upon a request by the defendant." Brewer v. Williams, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977). On appeal, the State bears the "heavy burden" of establishing the validity of a waiver. United States v. Forrester, 512 F.3d 500, 507 (9th Cir. 2008). This Court must "indulge in every reasonable presumption against waiver." Williams, 430 U.S. at 404.

Jackson appeared at the initial November 30, 2015 probable cause and bond hearing via teleconference from the Asotin County Jail. RP 5. He did not have an attorney present and none had yet been appointed. RP 3; CP 111. The trial court immediately found probable cause for the alleged crimes and the prosecutor began discussing the bond amount and conditions of release. RP 5-7.

Only after several pages of discussion did the court tell Jackson, "you have the right to remain silent." RP 8. The court then informed Jackson:

> Do you wish to be represented by an attorney? The right to an attorney is two-fold. You have a right to an attorney to defend you on the charges and you have a right to an attorney today to help you establish conditions of release.

RP 9. Jackson responded, "No, sir. Can I -- well, I -- I don't really need any attorney right now." RP 9. The court said, "Okay," and proceeded to

discuss the bond order with Jackson. RP 9. The court set Jackson's bond at $15,000 and entered a bond order the same day.[2] RP 10-12; Ex. P-2. Charges were also filed against Jackson on November 30. CP 12.

The record shows the trial court did not engage in any colloquy on the record with Jackson. The court informed Jackson only that he had the right to have an attorney help him establish conditions of release. RP 9. The court did not inform Jackson of the risks of proceeding without an attorney, the minimum seriousness of the charge, or the ramifications of entering a bond order or later failing to appear for court. Nor did the court inform Jackson of the procedural rights he was guaranteed in RCW 10.21.060(3), including the opportunity to testify, present witnesses, and "present information by proffer or otherwise." Briefly informing Jackson he had the right to counsel falls far short of the colloquy contemplated by Faretta.

Absent an adequate colloquy, the record must reflect Jackson was fully apprised of the procedural rules governing his defense and the risks associated with self-representation, measured "at the time of his decision."

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[2] At a later bond hearing on August 2, 2016, Jackson was again denied his right to counsel. RP 99-102. The commissioner at that hearing noted Jackson's attorney was not present and "[w]e'll talk a bit further about whether or not you want to wait for him to be here," but then proceeded to allow the State to argue without hearing from Jackson. RP 102-03. After discussion between the State and the commissioner, Jackson asked, "is it possible that I can have my attorney present?" RP 105. The commissioner ignored Jackson and imposed a temporary bond requested by the State. RP 105. The trial court later refused to reconsider that bond. RP 111.

Mohawk, 20 F.3d at 1484. Again, the record fails to reflect any such understanding. At the point he waived counsel, Jackson knew only that he had the right to remain silent and the right to an attorney. Nowhere in the record prior to his waiver were his procedural rights stated or explained. At no time was he informed that his failure to appear following entry of a bond order could result in a bail jumping charge. Under the circumstances, "I don't really need an attorney right now," was not a knowing, intelligent, and voluntary waiver of the right to counsel.

The State may argue in response that Jackson waived his right to counsel with his "eyes open" because he has a long criminal history and is a capable advocate, well-versed in the criminal rules. The State's argument fails for two reasons. First, the record at the time of the bond hearing does not reflect this, which is the relevant record for this Court's review.

Second, a defendant's experience with the criminal system or skill as a litigator does not make an otherwise invalid waiver valid. Silva provides a useful analogy. There, the record demonstrated Silva understood the nature and gravity of the charges against him, and was aware of the risks of self-representation. Silva, 108 Wn. App. at 540. He displayed "exceptional skill" during his numerous pretrial motions, including "persuasively written briefs, skillful examination of witnesses, and articulate argument." Id. at 541. Often, Silva obtain the relief he requested. Id.

Nevertheless, the court explained, "even the most skillful of defendants cannot make an intelligent choice without knowledge of all facts material to the decision." Id. Silva was never advised of the maximum possible penalties for the charged crimes. Id. The court held "[a]bsent this critical information, Silva could not make a knowledgeable waiver of his constitutional right to counsel." Id. Without reviewing prejudice, the court reversed Silva's convictions because his waiver was invalid. Id. at 542.

After waiving his right to counsel, Jackson articulated several reasons why the court should release him on bond. RP 9-10. He successfully advocated on his own behalf, with the court dropping the bond amount from the State's requested $25,000 to $15,000. RP 5, 10-11. Silva demonstrates, however, that Jackson's success at the bond hearing does not make the waiver of his right to counsel valid. The fact remains that he was never informed of the risks of proceeding without representation, the risks of entering a bond order, or the procedural rights guaranteed to him at the bond hearing. Absent this critical information, Jackson could not make a knowing and intelligent waiver of his right to counsel.

3. Denial of counsel is presumptively prejudicial, rendering the bond order void and requiring dismissal of Jackson's conviction.

Courts do not engage in harmless error analysis where a defendant is denied the right to counsel. Heddrick, 166 Wn.2d at 910 ("A complete

denial of counsel at a critical stage of the proceedings is presumptively prejudicial and calls for automatic reversal."); State v. Silva, 108 Wn. App. 536, 542, 31 P.3d 729 (2001) ("It is fundamental that 'deprivation of the right to counsel is so inconsistent with the right to a fair trial that it can never be treated as harmless error.'" (quoting Frazer v. United States, 18 F.3d 778, 782 (9th Cir. 1994)).

Release pursuant to a court order or admitted to bail with knowledge of a subsequent personal appearance is an essential element of bail jumping. RCW 9A.76.170(1); State v. Williams, 162 Wn.2d 177, 183-84, 170 P.3d 30 (2007). The trial court entered a bond order following the November 30 hearing at which Jackson was denied counsel. CP 15-16. The State then used this bond order to prove the essential element of bail jumping that Jackson had been "released by court order or admitted to bail." Ex. P-2; RP 163-64, 240-41; CP 53 (to-convict instruction).

In State v. Milton, 160 Wn. App. 656, 658, 252 P.3d 380 (2011), a restitution order was entered following a restitution hearing where Milton was not represented by counsel, despite CrR 3.1(b)(2) guaranteeing the right to counsel at all sentencing proceedings. The court of appeals accordingly vacated the restitution order without considering prejudice. Milton, 160 Wn. App. at 659.

Typically the denial of counsel will result in a new trial. See, e.g., Acrey, 103 Wn.2d at 212; Silva, 108 Wn. App. at 542. Here, however, the harm resulting from the denial of counsel cannot be undone, because the State must show Jackson was released pursuant to a court order or admitted to bail *prior* to his failure to appear. Like Milton, the November 30 bond order was entered following a hearing at which Jackson was denied the right to counsel. The bond order is therefore void and must be vacated.

The State may argue Kelley's testimony also established Jackson was released by a court order or admitted to bail. RP 162-65 (testifying the bond order was entered on November 30, 2015 and Jackson posted $1,500 to secure his release). But the fact remains that Jackson did not validly waive his right to counsel at the bond hearing and the bond order was entered as a result of that hearing. Lack of counsel contaminated that entire proceeding. Kelley's testimony cannot save the validity of the bond order.

Without evidence of the essential element that Jackson was released by a court order or admitted to bail, the State cannot prove bail jumping. See, e.g., State v. Le, No. 72166-6-I, noted at 191 Wn. App. 1016, 2015 WL 7300787, at *2 (Nov. 16, 2015) (reversing Le's bail jumping conviction for insufficient evidence where the State did not show Le had been released by

court order).[3] The proper remedy is dismissal of Jackson's conviction. State v. Hickman, 135 Wn.2d 97, 103-05, 954 P.2d 900 (1998).

E. ARGUMENT OF RESPONDENT

THE TRIAL COURT ACTED WELL WITHIN THE BOUNDS OF THE LAW AND ITS DISCRETION IN IMPOSING AN EXCEPTIONAL SENTENCE DOWNWARD.

A trial court may impose a sentence outside the standard range "if it finds, considering the purpose of [chapter 9.94A RCW], that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. The legislature intended this exceptional sentence provision "to authorize courts to tailor the sentence—as to both the length and the type of punishment imposed—to the facts of the case, recognizing that not all individual cases fit the predetermined structuring grid." In re Smith, 139 Wn. App. 600, 603, 61 P.3d 483 (2007).

An exceptional sentence may be reversed on appeal only if: (1) under a clearly erroneous standard, there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence (first prong); (2) under a de novo standard, the reasons supplied by the trial court do not justify a departure from the standard range (second prong); or (3) under an abuse of discretion standard, the sentence is clearly excessive or clearly too

[3] Under GR 14.1, as an unpublished decision, Le has no precedential value, is not binding on any court, and is cited only for such persuasive value as this Court deems appropriate.

lenient (third prong). RCW 9.94A.585(4); State v. France, 176 Wn. App. 463, 469, 308 P.3d 812 (2013).

RCW 9.94A.535(1) permits a trial court to impose an exceptional sentence below the standard range "if it finds that mitigating circumstances are established by a preponderance of the evidence." The statute provides an illustrative list of mitigating factors that "are not intended to be exclusive reasons for exceptional sentences." Id. The State does not dispute the trial court had discretion to impose an exceptional sentence downward based on a mitigating factor not expressly enumerated in RCW 9.94A.535(1). See Br. of Resp't, 11 (acknowledging "that section contains a non-exclusive list of circumstances which might justify a mitigated exceptional sentence").

Though the State never articulates the standard or review, it appears to challenge both the factual basis for the sentence (first prong) and the reasons supplied by the trial court to justify departure from the standard range (second prong). The State does not appear to argue the sentence is clearly too lenient (third prong). However, this brief addresses each prong in turn to demonstrate the trial court acted well within the bounds of the law and its discretion in imposing an exceptional sentence downward.

1. The trial court's factual basis for the mitigated sentence is supported by substantial evidence in the record.

The first prong involves a factual inquiry: whether the trial court's reasons for departing from the standard range are supported by substantial evidence in the record. State v. Statler, 160 Wn. App. 622, 639-40, 248 P.3d 165 (2011); State v. Davis, 146 Wn. App. 714, 721, 192 P.3d 29 (2008). Substantial evidence is evidence sufficient to persuade a fair-minded rational person of the truth of the declared premise. State v. Jeannotte, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997).

First and foremost, the State does not include any assignments of error in its opening brief. See Br. of Resp't, 1; RAP 10.3(a)(4) (specifying a brief of appellant should contain "[a] separate concise statement of each error a party contends was made by the trial court"). "[A]rgument unsupported by an assignment of error does not present an issue for review." Rutter v. Rutter's Estate, 59 Wn.2d 781, 788, 370 P.2d 862 (1962); accord Escude v. King County Pub. Hosp. Dist. No. 2, 117 Wn. App. 183, 190 n.4, 69 P.3d 895 (2003) ("It is well settled that a party's failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error."). This Court should decline to review the State's argument.

Even if this Court reviews the State's argument, unchallenged findings of fact are verities on appeal. State v. Gibson, 152 Wn. App. 945, 951, 219 P.3d 964 (2009). All the trial court's findings supporting the exceptional sentence are therefore verities on appeal.

The trial court's written findings focus largely on whether a standard range sentence in Jackson's case served the purposes of the SRA. This appears to be the State's chief complaint. See Br. of Resp't, 12, 16; State v. Shephard, 53 Wn. App. 194, 201, 766 P.2d 467 (1988) ("A court's subjective determination that the standard range does not adequately advance the purpose of the SRA to protect the public is not a substantial and compelling reason justifying a departure."). However, "written findings may be supplemented by the trial court's oral decision or statements in the record." In re Det. of LaBelle, 107 Wn.2d 196, 219, 728 P.2d 138 (1986).

The trial court's oral decision makes clear the factual basis for a mitigated sentence was Jackson's conduct that resulted in the bail jumping conviction. The court repeatedly emphasized Jackson was "lackadaisical" in missing a single pretrial hearing. RP 281 ("Mr. Jackson was lackadaisical."), 281 (finding the SRA was not intended "to punish so harshly someone who is lackadaisical"), 282 (finding it to be "nonsensical" to punish Jackson so harshly for "missing a court date because of his lackadaisical attitude"), 283 (noting Jackson "has a very difficult time keeping times and dates straight

for court"), 283 (emphasizing "he may be lackadaisical"), 285 (contrasting violent offenders and "an individual like Mr. Jackson, who is, by everyone's characterization, lackadaisical"). The court found by a preponderance of the evidence that "Mr. Jackson's lack of appearance was a mistake . . . and was characterized as such by both parties during the course of trial." RP 289. The court believed it was excessive to punish a man to five years of incarceration "for missing a pretrial." RP 281.

The trial court found the missed court date did not result from maliciousness of "some kind of wrongful mindset." RP 283. As the court emphasized, "[t]his is not a gentleman who skipped town, went on a crime spree across six states, and finally got corralled somewhere in the Badlands of South Dakota." RP 283. Rather, Jackson admittedly made a mistake and inadvertently forgot his court date. RP 279 ("And I just . . . I made a mistake. I made a mistake that cost me some years out of my life now."). The court further emphasized Jackson was arrested three days later when he complied with the terms of his probation and reported to his probation officer. RP 283 (noting Jackson "was picked up while he was observing the terms of [his] supervision").

These findings are well supported by the record.[4] For more than six months, Jackson appeared at ten hearings, albeit late to two of them. RP 16, 28, 36, 41, 47, 52, 57, 62, 69-70, 74-75. Nearly two months after his May 16 court date, which lasted only a few minutes, Jackson forgot to appear for the July 11 pretrial hearing. RP 79-80, 86-87, 194. Defense counsel explained he usually called Jackson before each hearing, but did not call Jackson before the July 11 hearing because counsel's phone was not working. RP 91. Jackson testified he was baffled by missing the court date, believing his case was set for trial on July 26, and he need not appear until that date. RP 197-99. He was arrested as the probation office on July 14, when he was attempting to comply with the terms of his supervision. RP 197.

This evidence establishes Jackson did not intend to evade prosecution by missing court or even that he intentionally missed court for any other reason. By all accounts, he was simply forgetful and lackadaisical about keeping track of his court dates, and made a mistake. The first prong is therefore satisfied: there is sufficient evidence in the record to support the trial court's reasons for departing from the standard range.

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[4] The State asserts the trial court's finding that Jackson's conduct was lackadaisical "mischaracterizes the record" and "is not supported by the record." Br. of Resp't, 18. Again, however, the State has not assigned error to that finding, so it is now a verity. Gibson, 152 Wn. App. at 951. Regardless, the record well supports the trial court's finding to that effect, which the State simply disagrees with.

2. The trial court articulated substantial and compelling reasons to justify departure from the standard range.

Under the second prong, courts determine whether, as a matter of law, the reason for the exceptional sentence justifies departure from the standard range. Davis, 146 Wn. App. at 720-21. "The sentencing court may consider other factors [beyond the nonexclusive list of aggravating and mitigating factors] so long as they are consistent with the purposes of the SRA and are supported by the evidence." Id. at 721.

a. The mitigating factors properly relate to the circumstances of the crime.

A review of the case law, as well as the statutory aggravating and mitigating factors, makes clear that an exceptional sentence is appropriate where the defendant's conduct or the circumstances surrounding the offense are either more or less egregious than typical for that particular offense. See State v. Jacobson, 92 Wn. App. 958, 965, 965 P.2d 1140 (1998); State v. Pennington, 112 Wn.2d 606, 610, 772 P.2d 1009 (1989) ("An exceptional sentence is appropriate only when the circumstances of the crime distinguish it from other crimes of the same statutory category.").

For example, a trial court may consider whether defendants' youthfulness diminished their culpability and capacity to appreciate the wrongfulness of their conduct in determining whether a mitigated sentence is appropriate. RCW 9.94A.535(1)(e); State v. O'Dell, 183 Wn.2d 680, 695-

97, 358 P.3d 359 (2015). Similarly, a mitigated sentence was appropriate where the defendant's entrapment defense failed, but there was evidence he was not predisposed to deliver cocaine and was induced to do so by the informant. RCW 9.94A.535(1)(d); Jeannotte, 133 Wn.2d at 858.

By contrast, an exceptional sentence cannot be based on some personal attribute of the defendant unrelated to the facts of the crime. For instance, a defendant's drug or alcohol problem, in and of itself, does not justify an exceptional sentence downward. Pennington, 112 Wn.2d at 611. Likewise, a defendant's remorse does not justify a mitigated sentence, because it "does not distinguish one crime from another of similar character; rather it merely reflects a defendant's particular response after the crime." State v. McClarney, 107 Wn. App. 256, 265, 26 P.3d 1013 (2001). Nor is a defendant's strong family support a valid mitigating factor because it "does not relate to the crime committed." State v. Fowler, 145 Wn.2d 400, 411, 38 P.3d 335 (2002).

The trial court did not rely on some personal characteristic of Jackson, unrelated to the crime, to justify the mitigated sentence. Rather, the court considered the facts of the offense: Jackson was lackadaisical about remembering court dates and inadvertently forgot to attend a single pretrial hearing, after attending numerous hearings over several months. The court further considered that Jackson was arrested only three days later when he

reported to his probation officer, further demonstrating Jackson's conduct was less egregious than the typical bail jumping case. These facts properly relate to the crime and distinguish it from the typical bail jumping case.

In arguing Jackson's conduct does not distinguish his offense from the typical bail jumping, the State points to the elements of the offense. Br. of Resp't, 18. A person is guilty of bail jumping when he fails to appear for court after "having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state." RCW 9A.76.170(1); CP 53. The State argues the trial court's consideration of Jackson's mental state is improper because "[t]here is no requirement to prove contemptuous intent to miss a court date." Br. of Resp't, 18.

The State is correct Jackson's lackadaisical attitude does not render him not guilty of the offense. See State v. Carver, 122 Wn. App. 300, 306, 93 P.3d 947 (2004) (holding "I forgot" is not a defense to bail jumping). But the State misses the point of a mitigated sentence. Conduct that does not establish a defense may still diminish an individual's culpability, which can be a valid mitigating factor. See O'Dell, 183 Wn.2d at 692 (recognizing the retribution rationale for sentencing relates to an offender's blameworthiness). The SRA specifies several mitigating factors where the defendant's conduct did not amount to a full defense, but still renders him or her less culpable.

See, e.g., RCW 9.94A.535(1)(a) (failed self-defense claim), (1)(c) (failed duress defense), (1)(d) (failed entrapment defense), (1)(e) (failed diminished capacity defense).

Moreover, the trial court may look beyond to the statutory elements of the crime in considering an exceptional sentence. For instance, there is no mental state required to convict a defendant of child rape—it is a strict liability offense. State v. Deer, 175 Wn.2d 725, 731, 287 P.3d 539 (2012). Nevertheless, trial courts may consider whether a defendant's youthfulness diminished his culpability in committing child rape. O'Dell, 183 Wn.2d at 698-99. This makes clear the fact that bail jumping does not have a contemptuous intent element does not mean the trial court cannot consider the defendant's intent in missing court. The State's rigid focus on the elements of bail jumping is contrary to the law. See Br. of Resp't, 17-18.

Finally, the State cites State v. Evans, 80 Wn. App. 806, 911 P.2d 1344 (1996), to argue "the fact that [Jackson] didn't act with malice is of not [sic] a basis for an exceptional sentence below the standard range." Br. of Resp't, 19. Evans recognized "lack of a 'bad' motive has been held to be an improper mitigating circumstance in support of an exceptional sentence." 80 Wn. App. at 815. First, it is not clear how Evans can be squared with more recent supreme court cases like O'Dell, where factors that diminish culpability, like the defendant's mental state, may be considered.

Second, the trial court did not rely on Jackson's lack of "bad" motive. Rather, the court emphasized Jackson missed a single pretrial hearing after regularly attending hearings for over six months, simply because he made a mistake and forgot his court date. RP 281-83; CP 108. The court further emphasized that Jackson was arrested only three days after the missed court date when he reported to his probation officer. RP 282-83; CP 108. Evans does not control.

b. The purposes of the SRA are not served by a standard range sentence.

The trial court's reasons for departing from the standard range are consistent with the purposes of the SRA, enumerated at RCW 9.94A.110. The court analyzed each of the specified purposes in turn, finding they were not furthered by a standard range sentence under the facts of the case. RP 280-96; CP 106-10. The court's analysis bears repeating here, to show how carefully and thoughtfully the court exercised its discretion.

Ensure the punishment is proportionate to the seriousness of the offense and the offender's criminal history. The court acknowledged Jackson's criminal history. RP 283-84; CP 108 (Finding of Fact (FF) 2.7). Contrary to the State's portrait of Jackson as a career criminal, however, his history largely demonstrates drug and alcohol addiction. CP 172; RP 268-70. Regardless, Jackson's criminal history would not be an appropriate

factor to consider in imposing a mitigated sentence because it duplicates the factors already considered by the legislature. Jacobson, 92 Wn. App. at 965 ("A stated reason justifying an exceptional sentence is legally adequate if it is substantial and compelling, and does not duplicate factors necessarily considered by the Legislature in computing the standard range.").

The court also noted that an individual convicted of first degree assault or first degree assault of a child—serious violent offenses—would be facing the same minimum sentence as Jackson. RP 281-82; CP 107-08 (FF 2.5); RCW 9.94A.030(46) (defining these as serious violent offenses); RCW 9.94A.540(1)(b) (setting a mandatory minimum term of five years). The State takes issue with the court's reasoning on this point. Br. of Resp't, 12.

The State is correct that an individual convicted of those offenses with Jackson's offender score would be facing a much higher standard range sentence. RCW 9.94A.510, .515. However, the court's point is still relevant: Jackson was facing the same sentence as the mandatory minimum for some of the most serious violent offenses that can be committed under Washington law. The court considered such punishment for mistakenly missing a single pretrial hearing to be "nonsensical." RP 282.

Promote respect for the law by providing punishment which is just. The trial court acknowledged imposing punishments that are too lenient can diminish the public's respect for justice. RP 284; CP 108 (FF 2.6).

However, "it also diminishes respect for the law by punishing crimes too harshly in a draconian fashion simply because there is a score sheet to go by." RP 284. The court therefore found it "poses the risk of diminishing the public's respect for the system" by taking away five years of Jackson's life for missing a single court date, where there was no evidence of malice and he was arrested three days later when he reported to his probation officer. CP 108.

Be commensurate with the punishment imposed on others committing similar offenses. The court again acknowledged individuals with the same 9+ offender score would be facing 51 to 60 months for bail jumping. CP 108 (FF 2.7). However, the judge noted, on a personal level, that in his more than 25 years on the bench and in private practice, he could not "recall an instant where someone was sentenced to such a harsh punishment solely for bail jumping, even though never convicted of any other underlying charges." CP 108; RP 284.

Protect the public. The trial court found, based on substantial evidence in the record, "Mr. Jackson merely missed Court, only to be arrested three days later when he voluntarily appeared at probation. The public was not harmed in any way nor could the public have been harmed in any way." CP 108 (FF 2.8). The court is correct that bail jumping is classified as a nonviolent offense and is not a crime against persons or

property. RCW 9.94A.030(34); RCW 9.94A.411. The court reasoned that sending Jackson to prison for 51 to 60 months "serves no useful purpose in terms of securing the protection of the public." CP 108; RP 284-85.

Offer the offender an opportunity to improve himself. Jackson acknowledged he "made a mistake" in missing court, but pointed out he was the primary caregiver for his son and had "been on probation for a whole year without any violations and without even a warning." RP 278. The trial court found, "I'm not sure that a 60-month sentence would do anything to offer Mr. Jackson an opportunity to improve himself other than to give him a very, very long time to think about the fact that he missed a court date." RP 285; CP 109 (FF 2.9).

Make frugal use of the state's resources. The trial court "believe[d] that the State's resources are better off housing violent and dangerous people rather than an individual like Mr. Jackson, who is, by everyone's characterization, lackadaisical." RP 285; CP 109 (FF 2.10).

Reduce the risk of reoffending. Finally, the court did not find it "necessary for Mr. Jackson to surrender five years of his life in order to drive the point home to him that he needs to pay attention to his court dates and get where he's supposed to be and stay in touch with his attorney[.]" RP 285; CP 109 (FF 2.11). In response to this, the State argued a reduced sentence "is simply speeding up the process in which Mr. Jackson is given

an opportunity . . . to reoffend." RP 288. But Jackson was being sentenced for bail jumping, not for the underlying assault or drug offenses, which the State voluntarily dismissed. RP 285 ("I'm not here to sentence him on [the underlying crimes] today. I'm here to sentence him on simply a bail jumping and that was missing a court date.").

The trial court correctly identified Jackson's mistake in missing a single pretrial hearing as a substantial and compelling reason to depart from the standard range. The court then carefully considered the purposes of the SRA and concluded they were not served by a standard range sentence.

3. The sentence is not clearly too lenient.

A sentence is clearly too lenient "only if the trial court's action was one that no reasonable person would have taken." Jeannotte, 133 Wn.2d at 858. In Jackson's case, bail jumping was a class C felony, with a maximum sentence of five years and a seriousness level of only III. RCW 9A.76.170(3)(c); RCW 9A.20.021(1)(c); RCW 9.94A.515. With Jackson's offender score, the standard range was 51 to 60 months—the maximum possible sentence for bail jumping. RCW 9.94A.510. It does not shock the conscience to impose 30 months, which is still a significant amount of time. It cannot be said that no reasonable person would have imposed the same sentence, given the facts of the case. Nor does the State argue as much.

The trial court conducted the correct analysis before imposing an exceptional sentence downward. It first identified a factual basis for a mitigated sentence that distinguished Jackson's offense from the typical bail jumping case. The court found Jackson's simple lackadaisical attitude, rather than purposeful evasion of prosecution, was a substantial and compelling reason to depart from the standard range. The court then considered whether a standard range sentence served the purposes of the SRA and concluded it did not. Finally, the court imposed a reasonable sentence of 30 months.

The bottom line is that Jackson mistakenly missed a single pretrial hearing after attending 10 hearings for well over six months. It is the State's fervent prosecution of this inadvertence that shocks the conscience, not the trial court's imposition of a reasonable mitigated sentence. See RCW 9.94A.411 (nowhere requiring the State to prosecute bail jumping, instead allowing the State to decline to prosecute "in situations where prosecution would serve no public purpose . . . or would result in decreased respect for the law").[5] This Court should affirm the trial court's exceptional sentence. Jeannotte, 133 Wn.2d at 858-59.

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[5] RCW 9.94A.411(1)(c) further specifies "[i]t may be proper to decline to charge where the violation of law is only technical or insubstantial and where no public interest or deterrent purpose would be served by prosecution." One could readily question the State's discretionary decision to prosecute Jackson for such an

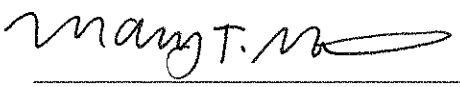
F. CONCLUSION

This Court should dismiss Jackson's conviction because the bond order—an essential element of the crime—was entered when Jackson did not have the benefit of counsel. Alternatively, this Court should affirm the trial court's imposition of an exceptional sentence downward.

DATED this 15th day of June, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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insubstantial violation, particularly where the underlying charges were dropped due to the police officer's termination from the force.

Appendix

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR ASOTIN COUNTY

STATE OF WASHINGTON, Plaintiff, v. STEPHEN JACKSON, Defendant.	NO. 15-1-00189-4 FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING EXCEPTIONAL SENTENCE DOWNWARD

I. HEARING

This matter came before the Court for sentencing on October 7, 2016. Plaintiff State of Washington was represented by Mr. Curt Liedkie. Defendant Stephen Jackson was represented by John Fay.

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II. FINDINGS

Having considered the records and files herein and having considered the arguments of counsel the Court now makes the following Findings in Support of its exceptional sentence downward of Mr. Jackson.

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2.1 Mr. Jackson was charged with Bail Jumping (C Felony) by the State of Washington. After a one-day jury trial on October 6, 2016, Mr. Jackson was convicted of this charge.

2.2 Mr. Jackson's standard sentence range, due to his criminal history, is 51-60 months based on a showing of ten prior felony convictions.

2.3 This Court finds, pursuant to the language of RCW 9.94A.010, specifically "The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, *but does not eliminate* [emphasis added], discretionary decisions..." that this Court has the discretion to impose a sentence below the standard sentencing guidelines.

2.4 This Court assesses the appropriateness of a standard range sentence pursuant to RCW 9.94A.010, including the seven factors listed therein. The Court finds that a standard range sentence of 51-60 months is not appropriate in this case.

2.5 The court observes that the first factor to consider is: "Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history score." The Court noted from the record that Mr. Jackson committed this crime by failing to appear for court on July 11 as required by his promise to appear. The Court notes that had Mr. Jackson instead been convicted of a felony involving actual assault and injury upon another person, he might well receive a sentence no more severe. The Court finds that it is not proportional for Mr. Jackson to serve the same amount

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of time for missing court as he would if convicted of assaultive or injurious behavior.

2.6 The second factor is: "Promote respect for the law by providing punishment which is just." The Court takes note that imposing punishments which are too lenient can diminish the public's respect for justice. However, imposing sentences that are excessive also diminish the public's respect for the justice system, and taking away five years of a man's life for missing court (no evidence of malice was demonstrated at trial and Mr. Jackson was arrested three days later when he showed up at probation), poses the risk of diminishing the public's respect for the system.

2.7 The third factor is: "Be commensurate with the punishment imposed on others committing similar offenses." The Court acknowledges the possibility that an individual with commensurate criminal history as Mr. Jackson duly convicted of the same crime would face the same 51-60 month range. However, in the Courts 25+ years as Judge and private counsel, this Court can never recall an instant where someone was sentenced to such a harsh punishment solely for bail jumping, even though never convicted of any other underlying charges.

2.8 The fourth factor is: "Protect the public." In this case Mr. Jackson merely missed Court, only to be arrested three days later when he voluntarily appeared at probation. The public was not harmed in any way nor could the public have been harmed in any way. Sending Mr. Jackson to prison for 51-60 months serves no useful purpose in terms of securing the protection of the public.

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2.9 The fifth factor is: "Offer the offender an opportunity to improve himself or herself." The Court finds that imposing a 51-60 month sentence upon Mr. Jackson for committing the error of failing to appear to court does not accord him with any opportunity to improve himself. ~~Indeed, it may have the opposite effect, discouraging Mr. Jackson from believing that the State will ever have compassion upon him in the future but will rather punish him with as much draconian vigor as possible regardless of the nature of his crime, thus obviating his incentive to obey the law in the future.~~

2.10 The sixth factor is: "Make frugal use of the state's and local government's resources." This Court finds that housing Mr. Jackson in a Washington State Penitentiary for 51-60 months because he missed Court is not a frugal use of the State's resources.

2.11 The seventh factor is: "Reduce the risk of reoffending by offenders in the community." Again, such a ~~draconian~~ punishment upon a man who was at most merely lackadaisical in behavior is less likely to cause other offenders to take note ~~than it is to cause them to despair that fairness or mercy will ever be accorded them by the State once they fall under the State's radar, as Mr. Jackson did. Such despair is more likely to create a disincentive for offenders to reintegrate into the community than to reduce the risk of re-offense.~~

III. CONCLUSIONS

From the foregoing finds of fact, this Court makes the following conclusions of law:

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3.1 There are substantial and compelling reasons justifying an exceptional downward sentence which have been established by the preponderance of the evidence.

3.2 A sentence within the standard range would be clearly excessive.

3.3 Considering the purposes of the Sentencing Reform Act, a determinate sentence of 30 months is supported by the record before the Court.

3.4 A sentence of 30 months is in the interests of justice.

Done in Open Court this 14th day of Nov., 2016.

JUDGE/~~COURT COMMISSIONER~~

Presented by:

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Attorney for Stephen Jackson

~~Approved as to Form~~: Copy Rec'd.

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State V. Stephen Jackson

No. 34814-8-III

Certificate of Service

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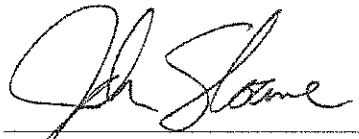
Re: Jackson
Cause No. 34814-8-III in the Court of Appeals, Division III, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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06-15-2017
Date
Done in Seattle, Washington

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